In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, PETITIONER

v.

ATTORNEY GENERAL OF THE UNITED STATES AND DIRECTOR, UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the direction of the Court that the government submit "a further response to petitioner's contention at pages 10–11 of his petition for writ of certiorari that there is no rational basis for applying 18 U.S.C. § 3568 only to prisoners sentenced after October 2, 1960." [1]

[1] In our original brief in opposition we did not respond to the merits of petitioner's contention that he was entitled to credit against his sentence for the period of his pre-sentence custody, but addressed ourselves only to the holding of the court below that the claim for credit for such time had to be

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In 1960 Congress amended 18 U.S.C. § 3568 to provide that the Attorney General should give credit for pre-sentence custody in any case where sentence was imposed on or after October 2, 1960, under a statute requiring the imposition of a mandatory minimum sentence (74 Stat. 738). Prior to the effective date of this amendment there were no situations in which the Attorney General was either required or permitted to give credit for pre-sentence custody.

In 1966, the Court of Appeals for the District of Columbia Circuit held in *Stapf* v. *United States,* 367 F. 2d 326, that in view of the fact that the 1960 amendment to § 3568 gave credit for pre-sentence custody to some prisoners sentenced after October 2, 1960, it would be unconstitutional to discriminate against other prisoners sentenced after that date by denying them credit for pre-sentence custody. After this decision of the District of Columbia Circuit was followed in the Fourth and Seventh Circuits (see *Dunn* v. *United States,* 376 F. 2d 191 and *United States* v. *Smith,* 379 F. 2d 628), the Bureau of Prisons

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brought in the Southern District of New York, where the sentence was imposed.

Subsequent to the filing of our opposition, petitioner filed a 2255 motion in the United States District Court for the Southern District of New York seeking credit for the pre-sentence custody and also credit for the time spent in custody pending appeal under his election not to commence service of sentence. That motion was filed on October 15, 1968 and is presently scheduled for argument in the district court on November 6, 1968. We reiterate our position that such a proceeding in the sentencing court is the only appropriate method to seek to remedy an allegedly improper lack of credit for pre-sentence custody.

issued a policy statement indicating that it would give credit for pre-sentence custody to prisoners sentenced within those circuits (Pet. App. D); the statement did not distinguish among sentences according to date. On further consideration and after the Fifth Circuit had rendered a decision following *Stapf* (see *Bryans* v. *Blackwell*, 587 F. 2d 764), the Bureau of Prisons amended its policy statement to apply the *Staph* ruling to all federal inmates. The amended policy statement declared (Pet. App. E, p. 43):

> Since the *Stapf* ruling was related to the 1960 amendment to 18 U.S.C. 3568, and was designed to remedy a disparity which would otherwise exist between mandatory minimum penalty cases which received the jail-time credit under the statute and nonminimum cases which did not, the credit will be applied only to those who were sentenced during the effective period of the 1960 amendment. * * *

This ruling was totally consistent with the reasoning of the *Stapf* decision. The unconstitutional discrimination found in *Stapf* resulted from the fact that the 1960 amendment required [redacted] the giving of credit for pre-sentence custody to those who received mandatory minimum sentences while such credit was not being given to other prisoners sentenced at the same time. As the court in *Stapf* recognized, however, the 1960 amendment to § [redacted] 3568 was not retroactive, 367 F. 2d at 330. As to prisoners sentenced prior to October 2, 1960, the applicable statute provided uniformly that "the sentence of imprisonment of any person * * * shall commence to run from the date on which

such person is received at the penitentiary, reformatory, or jail for service of said sentence. * * * No sentence shall prescribe any other method of computing the term." 62 Stat. 838 (Pet. 4).

Since petitioner's sentence is governed by a statute that applied without discrimination to all persons convicted contemporaneously with him, there is here none of the discrimination between persons similarly situated that was determinative in *Stapf*. To hold otherwise would be contrary to the express congressional directions that the subsequent amendments to 18 U.S.C. 3568 not be applied retroactively. See *Bandy* v. *United States*, 396 F. 2d 929 (C.A. 8); *Williams* v. *United States*, 335 F. 2d 290 (C.A.D.C.).

Congress clearly has the power to prescribe sentences for crimes committed against the United States, and has the power to reduce the penalties provided in earlier statutes. If it chooses to do so only prospectively it does not discriminate in such a way as to deny due process to those sentenced prior to the change whose sentences were consistent with the statute as it existed at the time of sentence. Similarly, here there is no unjust discrimination violative of due process against those who were sentenced prior to the amendments to § 3568 merely because Congress determined that those amendments should not be given retroactive effect. See *Comerford* v. *Massachusetts*, 233 F. 2d 294 (C.A. 1), certiorari denied, 352 U.S. 899.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

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